No. 97-16

In The

Supreme Court of the United States

October Term, 1997

OHIO FORESTRY ASSOCIATION, INC.,

Petitioner,

v.

SIERRA CLUB, et al.,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Sixth Circuit

BRIEF FOR *AMICI CURIAE* INSTITUTE FOR FISHERIES RESOURCES AND THE PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, INC., IN SUPPORT OF RESPONDENTS SIERRA CLUB AND CITIZEN'S COUNCIL ON CONSERVATION AND ENVIRONMENTAL CONTROL

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QUESTIONS ADDRESSED BY *AMICI*

Amici will address the following questions:

1. Should there be standing to obtain judicial review with regard to the legality of Land and Resource Management Plans ("LRMPs") adopted by the U.S. Forest Service pursuant to the National Forest Management Act (16 U.S.C. §§ 1600-1614) following their adoption but prior to approval of site-specific projects implementing those LRMPs?

2. Do challenges to LRMPs upon their adoption but prior to approval of site-specific projects meet the prevailing standards for "ripeness"?

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INTERESTS OF *AMICI CURIAE*

The Pacific Coast Federation of Fishermen's Associations, Inc. (PCFFA), is the United States west coast's largest organization of commercial fishermen, composed of 25 different commercial fishermen's port associations, marketing associations and vessel owners' associations with thousands of members who are commercial fishermen from San Diego to northern Alaska. It is a nonprofit trade association incorporated in the State of California since 1976. Fishermen belonging to PCFFA member organizations engage in a variety of west coast commercial fisheries, including those for salmon, crab, pink shrimp, albacore, rockfish, shark, halibut, swordfish, sea cucumber, sea urchin, squid and herring. Many of these species – in particular Pacific salmon, one of the most valuable fishery resources – are directly or indirectly affected by management activities on federal lands.

The Institute for Fisheries Resources (IFR), founded in 1992, is a nonprofit organization dedicated to the protection and restoration of marine and anadromous fish resources throughout the west coast, and is closely affiliated with PCFFA, including managing and expanding PCFFA's fishery conservation and watershed protection and restoration programs throughout the west coast.

In this brief, *Amici* discuss the policy and natural resource protection implications for the nation's fisheries of denial of judicial review of Forest Service LRMPs prior to the approval of on-the-ground operations. We do not address the merits of the case in chief.

STATEMENT OF THE CASE[1]

A detailed and accurate statement of the case and proceedings below is contained in the *Brief in Opposition for*

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[1] All parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *Amici* certify that no counsel for any party authored this brief in whole or in part and that no person or entity, other than the *Amici Curiae* or their counsel, has made a monetary contribution to the preparation and submission of this brief.

Respondents Sierra Club and Citizens Counsel on Conservation and Environmental Control on pages 1-11. *Amici* incorporate that Statement of the Case herein by reference.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Constitutional, statutory and regulatory provisions applicable to this case are included and reprinted in Appendix H to the Petition and in Appendix A to the *Brief in Opposition for Respondents Sierra Club and Citizens Counsel on Conservation and Environmental Control* already filed with this Court.

STANDING AND RIPENESS ISSUES PRESENTED BY THIS CASE

Amici address whether challenges to the legality of Land and Resource Management Plans ("LRMPs") upon their adoption by the U.S. Forest Service under the National Forest Management Act ("NFMA"), 16 U.S.C. §§ 1600-1614, but prior to approval of site-specific projects implementing the LRMP, meet existing standards for justiciability, including standing and "ripeness" for review.

We contend that, under existing precedent and in order to fully carry out the substantive and procedural policies and requirements of NFMA without consuming excessive judicial and public resources, judicial review of these final plans prior to the approval of specific projects should be provided, and further that such challenges are clearly justiciable as meeting both the standing and "ripeness" standards. We do not address the merits of the case in chief.

I. IMPACTS OF NATIONAL FOREST MANAGEMENT ON COMMERCIAL FISHING INDUSTRY AND SPORTFISHING INDUSTRY INTERESTS

Both commercial and recreational fishermen and their allied fishing businesses have a direct and immediate financial interest which is affected by U.S. Forest Service LRMPs

in a variety of ways. These economic interests are directly threatened when forest management plans allow excessive timber harvests or allow other activities to occur on these lands which damage fragile aquatic resources.

The mainstay of the west coast commercial and recreational fishing industries has long been the Pacific salmon.[2] Most salmonids are "anadromous." This means that salmon eggs are hatched and the young reared for the first portion of their life cycle *only in freshwater streams* (primarily in forested areas). As juveniles they then migrate downstream to occupy salt water estuaries and coastal wetlands, where they adapt to ocean conditions. They then spend their next 3 to 5 years growing to maturity in the ocean, after which they migrate back to their native river systems, eventually returning back to the very same stream from which they were spawned in order to lay their eggs for the next generation.

Salmon are genetically adapted to their particular river system like a key fits a lock. Each particular "stock" of salmon (the designation given to a salmon run from a particular river system) has been equipped by millions of years of evolution to best survive in its own particular stream environment. Dramatically changing the conditions in its native watershed (as through extensive logging or overgrazing) greatly decreases a salmon stock's chances for long-term survival.

Pacific salmon are especially sensitive to the health of their inland watersheds. The life needs of the various salmonid species vary, but several – in particular coho salmon, cutthroat and steelhead – are particularly dependent on

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[2] As used herein and as most commonly used, the term "salmon" means any of seven (7) major species of fish which are members of the genus *Oncorhynchus*, which includes chinook or king salmon (*Oncorhynchus tshawtscha*), coho or silver salmon (*Oncorhynchus kisutch*), coastal searun cutthroat (*Oncorhynchus clarki clarki*), steelhead (*Oncorhynchus mykiss gairdneri*), chum salmon (*Oncorhynchus keta*), pink salmon (*Oncorhynchus gorbuscha*), and sockeye salmon (*Oncorhynchus nerka*). As a genus these species are also often lumped together and called "salmonids."

upriver forest habitat. Salmon need abundant cold, clear water, widespread gravel beds with little fine silt, and abundant pools in which to lay their eggs and where their young can find food and shelter. Most of these characteristics can now only be found in abundance in old-growth forests (i.e., trees generally in excess of 120 years of age). Almost none of this type of virgin forest still occurs on private lands. Throughout the Pacific coast, the best remaining spawning and rearing habitat for Pacific salmon is now on federal lands, particularly those under control of the U.S. Forest Service. Habitat on private lands has been far more severely damaged than the remaining salmon habitat on public lands.

Logging (particularly on steep hillsides) can greatly increase the total amount of silt in a river system, which smothers salmon eggs and kills the juveniles. Logging also can deprive the stream of overhanging trees for shade, which in turn can increase water temperatures to the point where their native streams become fatal to young salmon. Moreover, logging also increases the frequency and severity of flooding and simplifies stream habitat to the point where it can become impoverished in the basic habitat characteristics salmon must have to survive.

The importance to salmon and other aquatic resources of federal lands in the west coast was recently recognized by federal agencies in the landmark scientific report *Forest Ecosystem Management: An Ecological, Economic, and Social Assessment* (July 1993), issued by the Forest Ecosystem Management Team (the "FEMAT Report"). The FEMAT team was a prestigious scientific panel commissioned by several federal agencies as part of the Northwest Forest Plan. The Northwest Forest Plan itself is a joint U.S. Forest Service and Bureau of Land Management broad scale land management plan for dealing with federal lands within the range of the northern spotted owl (most of the west coastal region from northern California to Puget Sound). The FEMAT Report concluded:

> Over the last century, federal land within the range of the spotted owl has become increasingly important for ensuring the existence of high quality aquatic resources. Privately held forest lands have been developed into farms, urban areas, transportation corridors, and industrial forests. Conversion of native forest to tree farms and agriculture decreases the capacity of these lands to supply high quality aquatic resources. Thus, society's reliance on federal forest lands to sustain aquatic resources continues to grow. Congress recognized the role federal lands play through the Organic Act of 1897, establishing the National Forest Reserves for the 'purpose of securing favorable conditions of water flows. . . . for the use and necessities of the citizens of the United States.' (FEMAT Report, at V-2)

Largely as a result of widespread inland habitat destruction by human activities, Pacific salmon are now in the midst of an *ecological crisis of unparalleled magnitude.* Many of these valuable wild salmon runs are now facing extinction. According to a 1991 comprehensive scientific stock assessment by the American Fisheries Society (the largest organization of fisheries scientists in the world), of more than 400 once known stocks *at least 106 major populations of salmonids on the West Coast are already extinct.* The AFS report also identified 214 of the remaining native naturally-spawning salmonid stocks as "at risk of extinction" in the Northwest and Northern California: 101 at high risk of extinction, 58 at moderate risk of extinction, and another 54 of special concern, plus 1 run at that time already listed under the federal Endangered Species Act (Nehlsen, et al., "Pacific Salmon at the Crossroads: Stocks at Risk from California, Oregon, Idaho, and California," *Fisheries* Vol. 16, No. 2 at 4-21 (March-April, 1991)). Since that 1991 report was written, two additional coho populations, several sockeye and chinook salmon populations in the Columbia River, a coastal subspecies of searun cutthroat, and several steelhead populations have also been listed under the federal ESA.[3]

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[3] The winter run chinook salmon stock was listed in the Central Valley of California at the time of the AFS report by emergency listing August 4, 1989 (54 Fed. Reg. 32,085) later made permanent, and the Snake

The FEMAT Report also noted the importance of federal lands specifically for protecting anadromous salmon species:

> Although several factors are responsible for declines of anadromous fish populations, habitat loss and modification are major determinants of their current status. Of the 314 at-risk anadromous salmonid stocks identified within the range of the northern spotted owl, only 55 occur solely on non-federal lands. Thus, federal agencies share in the responsibility for managing habitat for the other 259 at-risk stocks. (FEMAT Report, at V-2)

Roughly speaking, on average we have lost at least 80% of the productive capacity of salmon streams on the west coast as a direct result of various causes of watershed destruction, including excessive logging:

> Aquatic ecosystems in the range of the northern spotted owl exhibit signs of degradation and ecological stress. . . . Approximately 55 percent of the 27,000 stream miles examined in Oregon are either severely or moderately impacted by nonpoint source pollution [cite omitted]. Over one-third of Washington State's wetlands have been lost [cite omitted], and 90 percent of those remaining are considered

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River sockeye salmon was listed shortly afterwards on November 20, 1991 (56 Fed. Reg. 58,619). Snake River fall and spring/summer chinook stocks were listed in the Columbia River on April 22, 1992 (57 Fed. Reg. 14,653). The Umpqua Basin searun cutthroat in southern Oregon was listed on August 9, 1996 (61 Fed. Reg. 41,514). Coho populations in Central California and spanning the California-Oregon border were listed on October 31, 1996 (61 Fed. Reg. 56,138) and May 6, 1997 (62 Fed. Reg. 24,588) respectively. Steelhead stocks were listed in several areas on August 18, 1997 (62 Fed. Reg. 43,937), and a final decision on proposed listings of additional steelhead populations was postponed August 18, 1997 (62 Fed. Reg. 43,974) and is now due on February 9, 1998. All remaining Pacific salmon populations are undergoing a status review by the National Marine Fisheries Service and there are several listing petitions in process. By the end of 1998 every major stream and river system in California, Oregon and Washington will likely have ESA listed salmon.

> degraded [cite omitted]. . . . (FEMAT Report, at V-2)
>
> Loss and degradation of freshwater habitats are the most frequent factors responsible for the decline of anadromous salmonid stocks (Nehlsen, et al. 1991). . . . These changes result from a suite of human activities that include agriculture, *timber harvest* and associated activities, road construction, livestock grazing, water withdrawal and diversions, and dams. . . . *On federal lands, the most significant management activities affecting fish habitat are timber harvest and associated activities.* (FEMAT Report, at V-11, emphasis added)

In a recent mapping study of presently occupied habitat versus historical habitat, based on the AFS data and updates, and using the federal ESA definitions of "endangered" and "threatened," the data indicated the following distributions and population assessments across the landscape by salmon species:

Status of Salmon Species in the Pacific Northwest & California
Current Distribution as a Percentage of Historic Habitat[4]

Species	Extinct	Endangered	Threatened	Of Special Concern	Not Known to be Declining
Coho	55%	13%	20%	5%	7%
Spring/Summer Chinook	63%	8%	16%	7%	6%
Fall Chinook	19%	18%	7%	36%	20%
Chum salmon	37%	16%	14%	11%	22%
Sockeye	59%	7%	3%	16%	15%
Pink salmon	21%	5%	<1%	<1%	73%
Sea-run Cutthroat	6%	4%	61%	29%	0%
Winter Steelhead	29%	22%	7%	18%	24%
Summer Steelhead	45%	5%	5%	27%	18%

[4] Distribution maps were prepared by scientists on contract to The Wilderness Society, and were published in The Wilderness Society's report *The Living Landscape: Pacific Salmon and Federal Lands (Volume 2)*, Bolle Center for Forest Ecosystem Management (October 1993). When data upon which to determine status was simply inadequate, stocks were classified as "not known to be declining." However, this is not to say that some of these stocks might not also be in decline, only that sufficient data was not available with which to make a judgment. The report and data were peer reviewed.

In other words, Pacific Northwest salmon are already extinct in 38% of their historic range, and *in only 6% of their historic habitat range are fewer than 50% of these salmon species at risk or extinct.*[5]

With private land habitat so severely degraded, federal lands now play a crucial role in protecting and maintaining the remaining wild salmon runs on the west coast. Throughout the current range of coho salmon, for instance, some 2,478,000 acres of its range is on federal land in the State of Washington (22% of the total), 3,505,000 acres is on federal land in Oregon (38% of the total range) and 3,566,000 acres is on federal land in northern California (35% of the total range).[6] Furthermore, these federal lands contain the last best spawning and rearing refuge areas for this species. Salmon spawning and rearing habitat on federal lands is much less fragmented and degraded than on surrounding private lands.

For many decades federal land managers in the upper Columbia region where many salmon spawn have permitted serious overcutting of timber and overgrazing in key aquatic areas, and thus have been the cause of extensive loss of salmon spawning and rearing habitat. A recent scientific assessment report (November, 1996) published as part of the Interior Ecosystem Basin Management Project entitled *Status of the Interior Columbia Basin: Summary of Scientific Findings* indicates the magnitude of aquatic problems created by past federal lands management in the Upper Columbia Basin:

> A total of 142 fish taxa are reported within the Basin. . . . Aquatic habitat fragmentation (impassable obstructions – including dams, temperature increases, and water diversions) and simplification (channelization, removal of woody debris, channel

[5] The one exception to this extinction trend is pink salmon, which however occurs in the Northwest only in the extreme upper portion of the Puget Sound area in limited populations. These are also areas least affected by human development since they are in Olympic National Park.

[6] *The Living Landscape, supra*, note 4.

> bed sedimentation, removal of riparian vegetation, and water flow regulation) have resulted in a loss of diversity within and among native fish populations. . . . The composition, distribution, and status of fishes within the Basin is very different than it was historically. Some forms are extinct and many others, especially anadromous fish, are extirpated from large portions of their historical range. . . . Wild chinook salmon and steelhead trout are approaching extirpation in a major part of the remaining distribution. (106-107)

In addition to various salmon species, there are many other inland (nonanadromous) fish species throughout the western U. S. which are directly or indirectly affected by federal lands management. Many past federal land management practices have been highly destructive for fish. Within the study area of eastern Washington, eastern Oregon, Idaho and some of western Montana, for instance, the EPA found that 7,515 stream miles are water quality impaired on lands managed by the U. S. Forest Service, and 2,142 additional stream miles are water quality impaired on Bureau of Land Management lands. (*Status of the Interior Columbia Basin, id.,* 103)

Fishing is also a wetlands-dependent industry. Wetlands are the nursery areas for many valuable fish species. An estimated seventy-one (71%) percent of this nation's entire commercial fish and shellfish resource are wetlands-dependent.[7] Most inland recreational fisheries are also wetlands-dependent. Without protection of this nation's wetlands, however, much of this economic resource would simply disappear.

Federal land management can affect wetlands in many ways. Not only are many remaining important wetlands areas now on federal lands, but siltation from logging operations on federal lands can wash into critical downriver or marine estuaries and destroy key nursery areas for a wide variety of

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[7] From the EPA Office of Wetlands' estimates of value of commercial fish landings.

valuable fish and shellfish. Examples of commercially valuable species that are either wetlands or estuarine dependent for part of their life cycle are salmon, dungeness crab, pollock, halibut, shrimp, menhaden, bluefish, bass, and lobsters, as are most inland game fish, such as trout.

The FEMAT Report also identified a number of non-salmonid fish species placed at risk or affected by federal land management:

> Some resident fish populations have exhibited declines similar to those in anadromous salmonid stocks. We identified eight resident fish species within the range of the northern spotted owl that are at risk. Two, the Klamath shortnose sucker and the Lost River sucker, are listed under the Endangered Species Act. These species are found on the edge of the range of the northern spotted owl and their habitat is indirectly affected by timber harvest activities on federal lands. Five fishes are currently candidates for listing under the Endangered Species Act: the Oregon chub, the Olympic mudminnow, the Jenny Creek sucker, the McCloud River redband trout, and the bull trout. . . . Habitat loss and degradation are principal causal factors in declines of these fishes [cite omitted]. (FEMAT Report, at V-11)

Nor are west coastal habitat losses the only problem. Our entire nation's inland freshwater fish resource is also in serious trouble. According to studies by the American Fisheries Society, roughly *one-third of 790 known species of freshwater fish in the U.S. are in danger of extinction or of special concern.* In the case of a whole separate family of nonanadromous (i.e., resident) salmonids, more than 50% of all known U.S. species in that family are close to extinction. Within the largest known family of fish (the *Cyprinidae*), which include 29.2% of all known fish species in the U.S., the number of species classifiable as endangered (7.2%), threatened (9.4%), of special concern (10.8%) or already extinct

(3.3%) totals *30.7% of this entire large family of fish species.*[8] Many of these species are directly or indirectly affected by federal management activities (in particular timber harvesting) on surrounding federal lands. Federal land timber harvests particularly can adversely affect downstream water flows, increase water temperatures or produce tons of silt downstream to smother key fish spawning areas and kill juvenile fish in large numbers.

The productive capacity and economic value of salmon as a resource has historically been enormous. Even as recently as 1988, and in spite of already serious stock declines in the Columbia and elsewhere, the Northwest salmon industry (including both commercial and recreational components) still supported an estimated 62,750 family wage jobs in the Northwest and Northern California, and generated $1.25 billion in personal income for the region.[9] This represents a national resource of **roughly $39.5 billion in economic value** from salmon harvests alone – just from northern California and the Pacific Northwest.[10]

Since 1988, however, the rapid collapse of many wild west coast salmon runs has caused severe job losses in both the commercial and sportfishing industries. This has led to severe economic distress throughout coastal and many inland communities. After several years of increasingly severe restrictions, coho commercial salmon fisheries were closed down completely in California, Oregon and Washington by 1994. Chinook fisheries (based mostly on hatchery fish) are

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[8] These numbers are all from the American Fisheries Society, "Status of Freshwater Fishes of the United States: Overview of an Imperiled Fauna." *Fisheries*, Vol. 19, No. 1 (January, 1994).

[9] Economic figures for salmon supported jobs are taken from *The Economic Imperative of Protecting Riverine Habitat in the Pacific Northwest* (Report 5, January 1992) published by the Pacific Rivers Council, Eugene, OR. Figures are based on official harvest statistics from the Pacific Fishery Management Council.

[10] Estimated by calculating the present value of an income stream of $1.25 billion/year based on a 3% discount rate over 100 years.

also now severely restricted so as to avoid accidental harvest of depressed wild stocks. Coastwide economic losses from these increasingly draconian salmon harvest restrictions, including (for coho salmon) complete commercial fishing closures coastwide, however necessary in order to protect weak wild salmon runs, is difficult to quantify but is likely in excess of $100,000,000/year in net economic losses to the region. These losses have hit many members of the fishing community very hard.

In addition to commercial fishing, inland sportfishing is also a major economic interest. According to a recent economic study, the sportfishing industry contributed a total of $108 billion in 1996 in personal income to the overall national economy. These economic contributions were heavily concentrated in western states: California ($7,128 million), Oregon ($1,173 million), Washington ($1,358 million), Alaska ($957 million), Idaho ($462 million) and Montana ($448 million) – a total of $11,526 million in personal income impacts in 1996 from these states alone. These are also states which have among the heaviest concentration of federally managed forestlands.[11]

Fishing (both commercially and for recreation) is big business in the United States. The key to protecting much of this industry is the proper management of federal lands to preserve and protect economically valuable aquatic public resources.

II. FOREST PLANS MAKE FINAL DETERMINATIONS AND DICTATE SPECIFIC ON-THE-GROUND ACTIONS WHICH CAN RESULT IN CONCRETE HARM TO FISHERIES RESOURCES.

Forest management plans, far from being vague and non-binding, are often highly specific as well as legally binding on future management decisions. There are many specific and

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[11] The 1996 Economic Impact of Sport Fishing in the United States, American Sportfishing Association (1997).

concrete statutory requirements, both substantive and procedural, governing just *what* an LRMP must contain, *how* it should be developed and how it is to meet *both* NEPA requirements as well as the requirements of NFMA and other applicable statutes. Many of these are contained in 16 U.S.C. § 1604(g).

The Forest Service has adopted a number of regulations by which to implement 16 U.S.C. § 1604(g) which are themselves even more specific and detailed with respect to what a forest LRMP must contain. These voluminous requirements are found at 36 C.F.R §§ 219.1 through 219.29. It should be reiterated that the stated purpose of these LRMPs is to be in themselves the final determination for many important land use issues:

> Plans guide all natural resource management activities and establish management standards and guidelines for the National Forest System. *They determine resource management practices, levels of resource production and management, and the availability and suitability of lands for resource management*. . . . (36 C.F.R. § 219.1(b), emphasis added)

Finally, all future operations on the ground are not only predetermined by, but are *required* to be consistent with the underlying LRMP:

> Resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands *shall be consistent with the land management plans*. (16 U.S.C. § 1604(i) – emphasis added)

Forest plans make many final management decisions that directly affect aquatic ecosystem health and the nation's fisheries. These decisions, including the examples discussed below, can only be made in a planning document that encompasses a watershed or landscape scale. *None of these decisions can or will be available for judicial review at the later site-specific stage*. Some examples of these types of plan-level decisions follow:

A. Forest Management Zoning:

Forest plans provide the overall management direction and general guidelines for national forests for ten to fifteen years. 16 U.S.C. § 1604(b); *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1511 (9th Cir. 1992). Each plan is a strategy for managing the forest in an environmentally sound manner to produce goods, services, and amenities in a way that maximizes long-term public benefits. Each plan provides for coordinated multiple-use management of outdoor recreation, range, timber, watershed, wildlife and fish, minerals, and wilderness resources.

One way LRMPs control forest management is through a process of management zoning. Through the forest planning process, the Forest Service determines the uses to which each acre of national forest land will be put. These basic land-use designations attempt to balance competing interests and uses. For example, plan level land-use designations dictate on which lands and how timber harvests will be conducted. 36 C.F.R. § 219.14. These timber harvest decisions determine how fisheries and other aquatic protection measures will be prioritized because an area dedicated to timber production will not be an area dedicated to aquatic protection and restoration.

These zoning determinations can have direct and immediate consequences for aquatic habitat and species. For example, the LRMP for the Nez Perce National Forest in Idaho allocates 75% of the forest's remaining roadless acres to development and timber harvest. Roadless areas provide the last large blocks, outside of designated wilderness areas, of unimpacted salmon habitat in many national forests. If left untouched, these areas may become cornerstones for population restoration and recovery; if disturbed, they will further thwart efforts to restore fish habitat. The only assessment of how to manage these roadless areas across the landscape occurs in the forest management plan itself. If that assessment is incomplete or arbitrary, later site-specific decisions will not cure the defects nor change the rationale for the plan level decisions. Indeed, plan level decisions, such as opening

roadless areas to timber harvest, grazing, or mining, will not be revisited during later site-specific decision making.

B. Species Viability Determinations:

Under NFMA, the survival and viability of species within the plan area must be assured in the plan itself. 16 U.S.C. § 1604(g)(3)(B). NFMA regulations at 36 C.F.R. § 219.19 require that:

> Fish and wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area.

Likewise, pursuant to 36 C.F.R. § 219.27(g):

> Management prescriptions, where appropriate and to the extent practicable, shall preserve and enhance the diversity of plant and animal communities, including endemic and desirable naturalized plant and animal species, so that it is at least as great as that which would be expected in a natural forest and the diversity of tree species similar to that existing in the planning area.

The scope and legitimacy of these species viability determinations are clearly of major importance to many species, particularly to salmon species which are highly migratory and affected by activities over large ranges. These kinds of determinations, by their very nature, cannot be made on a site-by-site basis, but must be made in the context of a much larger planning area (i.e., at the "landscape scale").

If there are errors in these species viability decisions, they should be resolved at the forest plan level well before the errors in the plan can result in irrevocable damage to aquatic resources. Planning documents for specific timber sales will not provide any additional, needed information on a species' needs and the extent those needs are met throughout the forest. See *Seattle Audubon Society v. Lyons,* 871 F. Supp. 1291 (W.D. Wash. 1994), *aff'd*, 80 F.3d 1401 (9th Cir. 1996) (plaintiffs challenged forest plan's inadequacy to protect habitat to ensure viability of indicator species); *Sierra Club v.*

Lyng, 694 F. Supp. 1260 (E.D. Tex. 1988), *aff'd in pertinent part*; *Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991) (same).

Further, to fulfill their NFMA viability obligations, the LRMPs establish standards and guidelines to which all other site-specific management actions must conform. With respect to aquatic species and resources, LRMPs contain a set of specific measures and guidelines, such as riparian no-harvest buffer zones or steep slope erosion controls, for the protection of aquatic resources within the plan area. LRMPs also set standards for water temperature fluctuations, additional sediment input into rivers, streams, and lakes, and restoration of vital salmon habitat components.

As with any planning process, these standards and guidelines may or may not be biologically sound. Sediment standards may be inadequate to restore salmon spawning habitat; standards may allow harmful grazing that allows cows to eat riparian vegetation that provides shade, stream channel structure, and sediment control, etc.

If these standards and guidelines fail to provide for the continued viability of fish species, these final decisions will be ripe for review upon adoption of the forest plan. These issues should, in fact, be adjudicated at the plan level to prevent irrevocable commitments to inappropriate site-specific actions. Judicial review at the plan level can address viability standards and guidelines before actual operations have commenced, when it may well be too late.

C. Forest-Wide Timber Output Levels:

Forest plans schedule continued logging, road building, mining, and grazing throughout each forest. 36 C.F.R. § 219.16. LRMPs authorize increases or decreases in logging and grazing activities within salmon habitat; LRMPs also schedule the construction and decommissioning of Forest Service roads. All of these plan level decisions dramatically impact salmon and other aquatic resources.

Issues like forest-wide roads decommissioning will *only* be addressed at the LRMP forest plan level. If a national forest

decides that a certain percentage of roads must be closed to improve aquatic habitat, that decision will be made solely in the forest plan. If that percentage is biologically too low, it will not be revisited until the plan is revised. While the Forest Service may issue a separate site-specific decision document for a particular road decommissioning, it will not address the overall road decommissioning prescription throughout the forest except through the overall management plan.

D. Monitoring:

Forest plans also establish forest-wide monitoring programs that enable the Forest Service to evaluate whether and how well the plan is achieving its intended purposes. 16 U.S.C. § 1604(g)(3)(C); 36 C.F.R. §§ 219.11(d), 219.12(k). Each plan designates certain species as management indicator species because their population fluctuations reflect the effects of management activities on particular forest and aquatic habitat types. 36 C.F.R. § 219.19(a)(1). These species are monitored to determine whether the plan is meeting statutory and regulatory requirements and achieving its objectives.

Later challenges to specific timber sales or grazing permits will not address the overall monitoring scheme, such as whether the monitoring plan will in fact produce useful data or whether the chosen indicator species functions as a valid representative of habitat health.

E. Cumulative Impacts:

As defined under NEPA regulations, "cumulative impacts" is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of their source. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. See 40 C.F.R. § 1508.7. By their very nature, cumulative impacts and adoption of measures to avoid and mitigate these impacts are best addressed at the LRMP landscape scale. Any particular site-specific action may have only a very minimal impact on aquatic resources, yet it is the

cumulative effect from all such actions that, over time, amounts to serious problems. It is the cumulative effects of many such site-specific actions that may lead to catastrophic species extinction, as indeed has happened in the case of many Pacific salmon runs.

It makes no sense to attempt to ascertain cumulative impacts on an individual site basis. By their very nature cumulative impact assessments, and the development of measures and guidelines to avoid and mitigate these cumulative impacts, are best addressed – in fact can *only* be addressed – at the plan level. If these assessments are arbitrary or inadequate, the defects should be corrected in an immediate challenge to the plan itself, both to protect the resource and to promote more efficient planning and decision making.

The Forest Service itself has recognized the need to address cumulative impacts at the plan level. In Idaho, for example, the South Fork Salmon River provides critical spawning and rearing habitat for distinct subpopulations of Snake River spring and summer chinook salmon. Since the 1950's, South Fork Salmon River salmon have declined significantly, primarily due to habitat degradation caused by mining, grazing, logging, and associated road building that cause sedimentation. During the mid-1960's, massive landslides caused by past logging and road building activities buried portions of the South Fork Salmon River under three feet of dirt.

Since the landslides in the 1960's, the need for restoration of the South Fork watershed has been widely recognized by the Forest Service and other agencies. In the late 1980's, the Forest Service convened a group consisting of representatives of scientists, the timber industry, federal and state agencies, Indian tribes, and conservation groups, to negotiate a special management plan for the South Fork. After years of meetings and dialogue, this group developed "The South Fork Salmon River – An Area of Special Concern" guidelines. Both the Boise and Payette National Forest Plans include these special guidelines, which allow no new major land-disturbing actions to be scheduled in the South Fork watershed until interim sediment reduction objectives have been

achieved and restoration activities have improved in-river conditions.

These special concern guidelines, which control actions in parts of two separate national forests, made final decisions which became ripe for judicial review when the forest plans were adopted. These decisions will not be revisited at the project level, and in fact the special concern guidelines were specifically adopted to *avoid* piecemeal review at the individual project level. These are final, reviewable decisions, and delaying review would cause hardship to interests concerned with protecting fish and aquatic habitat. See *Buckley v. Valeo*, 424 U.S. 1, 117 (1976) (per curiam) (claim of impending future rulings which may damage interests was held adjudicatable as well as ripe for judicial review).

In short, many irrevocable management decisions – preferred land uses, aquatic species viability determinations and protections, monitoring, and cumulative impacts being only a few – will necessarily be made or predetermined at the landscape scale in the LRMP itself, rather than site-by-site. Individual operations will then inevitably flow from those higher level decisions.

Whether these final decisions made in LRMPs meet the applicable standards is a justiciable question of law. It makes no legal or logical sense to wait until operations commence for that review. Once a flawed plan has been formally adopted, the damage is done, the record is closed and the issue of its legal sufficiency is ripe. All future operations on the ground are required to be consistent with the underlying LRMPs. 16 U.S.C. § 1604(i). With this in mind, the Seventh Circuit (in *Sierra Club v. Marita*, 46 F.3d 606, 612 (7th Cir. 1995)) justifiably has allowed pre-operations challenges to plan level viability assessments, noting as follows:

> Once the plan has passed administrative review, the procedural injury has been inflicted. Unless a plaintiff's purported interest in the matter is wholly speculative, waiting any longer to address that injury makes little sense. Indeed, if the Sierra Club had to wait until the project level to address general procedural injuries regarding a broad issue like biological diversity, implementation of the forest plan might have progressed too far to permit proper redress.

A number of commentators have noted that forest management LRMPs under NFMA are very much like any other land use planning document:

> Once plans become final and are determined to be valid, they themselves become law. Much like zoning requirements or administrative regulations, the plans are controlling and judicially enforceable until properly revised [citing 16 U.S.C. § 1604(i)].[12]

Thus, like any other land use plan, it is appropriate that judicial review be available to determine whether such plans have been prepared in accordance with applicable laws and regulations.

III. IF THE PLAN IS SPECIFIC AND DEFINITE ENOUGH TO PASS MUSTER UNDER NEPA, IT IS SPECIFIC AND DEFINITE ENOUGH FOR A JUDICIAL DETERMINATION OF ITS SUFFICIENCY AS A FOREST PLAN

Management measures for forest management described in an LRMP also have to undergo NEPA analysis which must both ascertain and assess a wide variety of environmental impacts. The sufficiency of such documents is a question that courts must deal with all the time. It is appropriate that a court determine whether the agency acted arbitrarily, capriciously, abused its discretion or otherwise failed to act in accordance with the law. (See for instance *Lathan v. Brinegar*, 506 F.2d 677, 693 (9th Cir. 1974)).

It makes little sense to hold that such a description of management measures as contained in an LRMP is sufficiently *detailed* and specific to present a justiciable claim

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12 Wilkinson and Anderson, "Land and Resource Planning in the National Forests," 64 *Or. L. Rev.* 1, 74 (1985).

under NEPA, yet simultaneously somehow *too vague* to be reviewed under NFMA. If the standards and measures proposed in a plan are sufficient to meet the specific analysis requirements of NEPA, they logically should also be sufficient upon which to base judicial review as to the legal sufficiency of the plan itself.

In other words, if a plan gives rise to standing and is deemed a ripe controversy (and can therefore be judicially reviewed) in the NEPA context, then a final decision like an LRMP – containing the very same measures and impacts already analyzed under NEPA – should similarly give rise to standing and present a ripe controversy, and therefore also be subject to immediate judicial review. In both cases there is sufficient risk of adverse environmental effects to justify immediate judicial review. In fact, for any given LRMP the risks ascertained under NEPA and outlined under NFMA are one and the same.

If anything, the information required under NFMA is *more* detailed, specific and binding (not less) than that required under NEPA. Those environmental risks ascertained and discussed in the LRMP under NEPA *surely* cannot be dismissed now as purely speculative. If environmental risks are specific and concrete enough in one context (NEPA) for judicial review, how could they suddenly lack sufficient immediacy and concreteness for judicial review under NFMA?

Surely Congress must have intended NFMA planning documents like LRMPs to be sufficiently definite in their content that they would serve as a meaningful guide for future operations, and therefore were worth the costs and delay of putting them together. If they have that degree of definiteness and likely effect then standing and ripeness requirements must, of necessity, be satisfied.

Given how intertwined an LRMP is with NEPA analysis standards, we believe that NEPA case law on standing should shed some light. Under well established NEPA precedents, "injury in fact" need only be established by showing that the agency action created an *increased risk* of actual, threatened, or imminent environmental harm by the agency making its

decision, that such an increased risk of harm injures the plaintiff's particularized personal interests or that such injury was "substantially probable." (See *Committee to Save Rio Hondo v. Lucero*, 102 F.3d 445, 449 (10th Cir. 1996) and *Florida Audubon Society v. Bentsen*, 94 F.3d 658, 664-665 (D.C. Cir. 1996)). Given the nature of an LRMP, including its compelling effect on all future plan operations, these plans would clearly meet those standards.

IV. IMMEDIATE JUDICIAL REVIEW OF THE LEGALITY OF A FOREST MANAGEMENT PLAN IS WARRANTED GIVEN ITS IMPACT AND THE HIGH LIKELIHOOD OF ENVIRONMENTAL DAMAGE FROM INADEQUATE PLANS

Petitioners have noted in their brief that the Eleventh and Eighth Circuits have refused to allow pre-operations plan-level challenges, calling such challenges "unmanageable" (*Wilderness Society v. Alcock*, 83 F.3d 386, 390-91 (11th Cir. 1996) and *Sierra Club v. Robertson*, 28 F.3d 753, 758 (8th Cir. 1994)). However, at least two other Circuit Courts, both with extensive experience in reviewing such plans, have correctly concluded that such LRMP forest management plans contain numerous decisions that will, with certainty, commit or affect public resources both *in themselves* and in every later site-specific operation. For instance, the Ninth Circuit Court, in *Idaho Conservation League v. Mumma*, 956 F.2d 1508 (9th Cir. 1992), addressed this issue directly and pointed out the obvious need for such a plan level review prior to the commencement of implementing operations:

> More importantly perhaps, if the agency action only could be challenged at the site-specific development stage, the underlying programmatic authorization would forever escape review. To the extent that the plan predetermines the future, it represents a concrete injury that plaintiffs must, at some point, have standing to challenge. That point is now, or it is never. (*Idaho Conservation League, id.*, 1516)

The Seventh Circuit Court came to a similar conclusion in *Sierra Club v. Marita*, 46 F.3d 606 (7th Cir. 1995), noting:

> [A]s the district court points out, the regulations regarding forest management plans speak in mandatory terms. * * * The plans clearly require certain projects to be undertaken and indicate what their effects may be. * * * That the Service has yet to actively *inflict* the injury through the development of site-specific projects does not render the injury 'conjectural' or 'speculative' and therefore does not deprive plaintiffs of standing to challenge the plan. * * * As the Supreme Court noted in the very sentence before it created the 'certainly impending' language on which the defendants reply; [o]ne does not have to await the consummation of threatened injury to obtain preventive relief. (611-612, citations omitted)

We believe the logic of these two holdings is compelling. Rejection of the right of immediate judicial review would effectively nullify the ability of reviewing courts to perform their accustomed role of assuring that the Forest Service does not transgress the legal limits on its discretion or commit resources in ways that undercut the Congressional policies embodied in NFMA and the Forest Service's own regulations. As the Seventh Circuit further ruled in *Marita, id.*, at 613:

> In the present case, the Sierra Club argues that the plans as a whole inadequately address biological diversity and that procedural defaults in the development of those plans may have led to that inadequacy. Waiting until an actual timber sale occurs under the plan will not clarify the presentation of issues; arguments over the plan's sufficiency as a whole or the procedures followed in developing the plans with regard to diversity are as concrete now as they will ever become. We thus hold that the Sierra Club had standing to sue.

Many decisions are either made at or predetermined solely by the LRMP. All future plan operations are in fact *required* to be consistent with those decisions. 16 U.S.C.

§ 1604(i). Thus there may already be injury in fact by the very adoption of a defective or unlawful plan. Once the LRMP has in fact been adopted, and it is an agency final action, then the record has been closed and the issue of its very legality is clearly ripe. The procedural injury, far from being merely "imminent," has in fact *already occurred*. Environmental harms which may flow from the defects in a plan are at that point clearly threatened. Threatened future harm is enough for standing and "ripeness," so long as it is likely and not merely totally hypothetical or speculative. (*Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1991)).

Finally, we also do not believe that *Lujan v. National Wildlife Federation* (497 U.S. 871 (1990)) is dispositive, as is asserted by Petitioners. In that case there was no "ripeness" for the very simple reason that there had been no "agency final action," only a series of individual acts by managers as part of a policy long in place. Here, however, the final adoption of a formal LRMP under NFMA and as part of the NEPA process is obviously an agency final action, and as such the judicial review provisions or 5 U.S.C. § 704 and § 706(2) are clearly triggered and should be applied.

V. RESOLUTION OF ISSUES AT THE PLAN LEVEL PRIOR TO OPERATIONS ECONOMIZES FEDERAL RESOURCES AND BETTER PROTECTS THE PUBLIC

Hundreds of site-specific operations, such as aquatic restoration projects, road building, road decommissioning, grazing, mining, and timber harvest may ultimately flow directly from a single LRMP. When measures required in a management plan are flawed, or when for any of a number of administrative reasons the Forest Service has overlooked basic issues, these errors should be brought to the attention of land managers through an appropriate judicial review process *well before* contracts are bid out, commitments are irrevocably made or operations proceed in ways that damage public resources.

The government, in its brief (pg. 32 of Federal Respondent's brief) acknowledges that once a site specific action has commenced that both that action and that portion of the underlying plan relevant to that site specific action can then be challenged in court. However, it simply makes no sense, both as a matter of judicial efficiency and in terms of economizing limited federal agency resources, to *forbid* judicial review of a potentially flawed Land and Resource Management Plan (LRMP) where that forest plan itself makes definitive and controlling decisions. Deferring the issue until site-specific actions commence simply forces potential plaintiffs to challenge *each and every site-specific action* as they occur and results in a *multiplicity of court cases*, each attacking piecemeal different parts of the overall plan.

Thus it is far better to get to the root of the problem and try to resolve these flaws in one lawsuit at the plan level first. If the problem can be resolved there, dozens of later lawsuits attempting piecemeal resolution based on specific projects will become unnecessary. Judicial economy has long been a basis for encouraging speedy judicial review, and avoiding a multiplicity of suits with potentially conflicting outcomes is generally looked on with favor by federal courts:

> [A] federal court should consider and weigh in each case, and at every stage of litigation, the values of judicial economy, convenience, fairness, and comity. *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 350 (1988), citing *Mine Workers v. Gibbs*, 383 U.S. 715, 726-727 (1965).

Amici and other groups that work for protection of aquatic resources would face an almost insurmountable task if they had to challenge each and every site-specific Forest Service action that affected fish and their habitat. In the Pacific Northwest, there are over 20 national forests whose forest plans impact Pacific salmon species. Each of these national forests proceeds with hundreds of individual projects each year. Indeed, west coast fishermen simply could not challenge each of these projects individually and continue to pursue their jobs as commercial fishermen.

VI. THE LEGAL PRESUMPTION MUST BE IN FAVOR OF JUDICIAL REVIEW, PARTICULARLY WITH RESPECT TO ENFORCING PROCEDURAL RIGHTS TO ASSURE AGENCY COMPLIANCE WITH APPLICABLE LAW

Adoption of a Forest Service LRMP is a final agency action. Immediate judicial review of a final agency action serves as a safeguard against agency abuse of discretion and is in fact specifically provided for under 5 U.S.C. § 704 of the Administrative Procedures Act.

Noting this provision, this Court has previously strongly stated (*Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-141 (1966)) that judicial review of a final agency action should only very rarely be cut off:

> [A] survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is a persuasive reason to believe that such was the will of Congress [cites omitted]. . . . The Administrative Procedure Act provides specifically not only for review of '[a]gency action made reviewable by statute' but also for review of 'final agency action for which there is no other remedy in a court,' 5 U.S.C. § 704. . . . [T]his court has echoed that theme by noting that the Administrative Procedure Act's 'generous review provisions' must be given a 'hospitable interpretation' [cites omitted]. Again, in *Rusk v. Cort* [369 U. S. 367 (1961)] at 379-380, the Court held that only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should courts restrict access to judicial review.

This presumption strongly favoring judicial review has been frequently applied by this Court (see *Bowen v. Michigan Academy of Family*, 476 U.S. 667, 670-672 (1986) for an excellent discussion of the rationale for this presumption).

Essentially what *Abbott Laboratories, supra,* stands for is the rule that once an agency action which has legal effect is

finalized and the record is closed, then *at that point there is a ripe controversy* and that there are both public and private interests which favor immediate review. One of those public interests is judicial economy. Another is the governmental interest in settling disputes early rather than later. In this case all those interests are clearly apparent, and so under *Abbott Laboratories* the case is clearly ripe for review. Under *Abbott* also, this review should be granted unless there is clear and convincing evidence of Congressional intent to limit such review. However, there is no "clear and convincing evidence" of any such Congressional intent within NFMA. NFMA, far from discouraging public participation, at 16 U.S.C. §§ 1604(d) and 1612(a) actively requires it.

In fact, the ability to obtain judicial review following plan development is a natural extension of public involvement generally, and one that makes such participation meaningful. There is simply no persuasive argument for the proposition that judicial review, when granted, must always wait until operations have begun. In the *Abbott Laboratories* case, for instance, judicial review was granted to an FDA regulation well prior to any enforcement action. The mere possibility of future enforcement against the plaintiff was sufficient to find both standing and "ripeness" to challenge that regulation on its face.

This very Court has also noted that even the usual standards of judiciability, standing and "ripeness" should be much less restrictive when it comes to the enforcement of procedural rights such as the right of citizens to hold agencies accountable to law:

> There is this much truth to the assertion that 'procedural rights' are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. (*Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572, n.7 (1991))

That Court then used as an example the person living adjacent to the site of a proposed federal dam, who would have standing to challenge the agency's failure to prepare an EIS, "even though he cannot establish with any certainty that the statement

will cause the license to be withheld or altered, and even though the dam will not be completed for many years." (*Lujan v. Defenders of Wildlife, id.*, 572, n.7)

The full participation of the public in the management of what, after all, are *public* lands serves as an essential check against the possibility of arbitrary and capricious agency actions. It also assures better decision making, and can serve to bring errors to the attention of the agency before those errors can be perpetuated by ill considered actions. Immediate judicial review of agency final actions is an important procedural right which helps to assure the integrity of government and is a logical step which makes public participation truly meaningful. Congress mandated this type of review in 5 U.S.C. § 704 and § 706(2) for very good reasons, and under well established case law this right to judicial review should not be abridged unless there is clear and convincing Congressional intent to do so.

VII. CONCLUSION

To find that there should be no standing for review of LRMPs at the plan adoption stage, or that judicial review at the plan adoption stage is premature, would substantially undercut the substantive and procedural goals of the National Forest Management Act. Once a plan has been formally adopted and the administrative record closed, issues of whether the plan itself has complied with the law are clearly "ripe" and they will get no riper. Delay would be pointless as well as counterproductive.

Access to judicial review generally results in better decision making, brings errors to the attention of the agencies involved, and maintains the credibility and legitimacy of the governmental process. This is why there is a *very strong* presumption of judicial review of final agency actions unless there is *clear and convincing evidence of a contrary legislative intent*. No such intent appears anywhere within NFMA or in any other statute relevant to this case.

Challenging the legal sufficiency of a final agency action is also an important procedural right that should be given great

deference. The enforcement of such procedural rights is clearly "ripe" once the agency has in fact made its final action, and out of deference to the importance of those rights courts generally find standing without meeting all the normal standards of redressability and immediacy. (*Lujan v. Defenders of Wildlife, supra*, 572, n.7)

Major land use issues are either decided in or predetermined by LRMPs. Site-specific operations then flow directly out of and are required to be consistent with those decisions. Any issues about the legal sufficiency of the plan itself are best resolved at the plan level *before* operations commence in order to avoid irretrievable commitments of public resources or irrevocable environmental damage. Allowing pre-operational judicial review will improve Forest Service management as well as better protect the nation's valuable fisheries and the millions of jobs that depend on them.

Finally, in terms of judicial economy, it is far better to resolve major plan issues and to correct deficiencies in the plan itself once and for all at the plan level *prior* to operations than to require piecemeal review by way of a multiplicity of suits. The piecemeal approach means separate legal challenges to what may ultimately become hundreds of plan-based operations, complete with all the waste of agency and judicial resources such chaos would entail.

For these reasons, we believe that this Court should find that standing and "ripeness" exist for the judicial review upon plan adoption of U.S. Forest Service LRMPs and other forest management plans under the National Forest Management Act.

Respectfully submitted,

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Date: January 26, 1998